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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DEREK FOSTER,

Defendant and Appellant.

D051821

(Super. Ct. No. SCD20788)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielsen, Judge. Affirmed.

After pleading guilty pursuant to a plea bargain and admitting a strike prior conviction, Derek Foster was sentenced by the trial court. On appeal, Foster contends the trial court's use of his prior juvenile adjudication as a strike prior conviction violated his jury trial rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*). We reject his argument and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Foster was charged with various drug-related offenses occurring on or about July 13, 2007, with several sentencing allegations. On September 7, 2007, he pleaded guilty to sale of cocaine base and admitted a prior juvenile adjudication of robbery alleged as a strike prior conviction. In his plea agreement, the parties agreed that at sentencing the trial court would rule on his motion to dismiss the prior juvenile adjudication on the basis that under *Apprendi* it could not properly be used as a strike prior conviction. At sentencing, the trial court denied the motion to dismiss the prior juvenile adjudication, ruling that it was constitutionally permissible to use it as a strike prior conviction. Foster was sentenced to six years in prison, consisting of the lower term of three years, doubled based on his strike prior conviction.

DISCUSSION

Foster contends that because there is no right to trial by jury in juvenile proceedings, the use of his prior juvenile adjudication as a strike prior conviction violated his *Apprendi* jury trial rights.

Under *Apprendi* and its progeny, a defendant has a federal constitutional right to have the jury determine any fact that increases the penalty for an offense beyond the prescribed statutory maximum, unless the fact is a prior conviction or is admitted by the defendant. (*Apprendi, supra*, 530 U.S. at p. 490; *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 860.) Under the "Three Strikes" law, certain juvenile adjudications qualify as strike prior convictions that augment the defendant's penalty.

(Pen. Code,¹ § 667, subd. (d)(3).) A strike prior conviction must be pleaded and proven beyond a reasonable doubt, and the defendant has a statutory right to a jury determination of whether the prior conviction was incurred. (§§ 667, subd. (c), 1025; *People v. Bowden* (2002) 102 Cal.App.4th 387, 393.)² However, unlike adult charges, juvenile charges are decided by courts, not juries; thus, the facts of the offense underlying the juvenile adjudication have not been determined by a jury. (See *People v. Fowler* (1999) 72 Cal.App.4th 581, 585.)

Because there is no right to have a jury decide the facts establishing the *juvenile offense itself*, the courts have grappled with the questions of (1) whether *Apprendi* bars use of a juvenile adjudication as a strike prior conviction even though the jury decides (or the defendant admits) the *prior juvenile adjudication* was incurred, and (2) whether a juvenile adjudication is excluded from the prior conviction exception to the *Apprendi* rule which permits a sentencing court to make factual determinations based on the fact of prior convictions. Addressing these issues, numerous California appellate courts have held that *Apprendi* jury trial principles are not violated when juvenile adjudications are

¹ Subsequent statutory references are to the Penal Code.

² The jury determines whether the prior conviction documents are authentic and sufficient to establish the alleged prior conviction, whereas the trial court resolves any issues regarding identity of the defendant and qualification of the prior conviction as a strike. (§ 1025, subd. (c); *People v. McGee* (2006) 38 Cal.4th 682, 699-700, 709; *People v. Jefferson* (2007) 154 Cal.App.4th 1381, 1386.) The courts have relied on the prior conviction exception to the *Apprendi* rule to constitutionally permit the trial court's resolution of factual issues relating to prior conviction allegations. (*People v. McGee*, *supra*, at pp. 708-709; *People v. Jefferson*, *supra*, at pp. 1386-1388.)

used as strike prior convictions. (*People v. Bowden, supra*, 102 Cal.App.4th at pp. 391-394; *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 830-834; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1315-1316; *People v. Buchanan* (2006) 143 Cal.App.4th 139, 149-150; *People v. Del Rio* (2008) 165 Cal.App.4th 439, 441; see also *People v. Fowler, supra*, 72 Cal.App.4th at pp. 585-587; *People v. Palmer* (2006) 142 Cal.App.4th 724, 733.)

These courts concluded that *Apprendi* and its progeny do not limit the Legislature's authority to identify any fact (including a prior juvenile adjudication) that it deems reasonably relevant to sentence enhancement, as long as the defendant has the right to have the enhancing fact submitted to the jury and found to exist beyond a reasonable doubt, and under California's sentencing scheme this latter requirement is met for juvenile adjudications alleged as strike priors. (*People v. Smith, supra*, 110 Cal.App.4th at pp. 1078-1079; *People v. Superior Court (Andrades), supra*, 113 Cal.App.4th at pp. 833-834; *People v. Lee, supra*, 111 Cal.App.4th at p. 1316.)

Alternatively, these courts concluded that juvenile adjudications fall within the prior conviction exception to the *Apprendi* rule even though a jury has not established the facts establishing the underlying juvenile offense, reasoning that adjudication of juvenile charges by a court is permissible under the federal Constitution, and the juvenile proceedings incorporate a full panoply of procedural protections that ensure a reliable adjudication of the juvenile offense (including notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination, and

proof beyond a reasonable doubt). (*People v. Bowden*, *supra*, 102 Cal.App.4th at pp. 393-394; *People v. Superior Court (Andrades)*, *supra*, 113 Cal.App.4th at pp. 833-834.)³

Because a defendant does not have the right to a jury trial of the juvenile charges, a few California appellate courts have disagreed with the constitutionality of using juvenile adjudications as strike priors, and the issue is currently pending before the California Supreme Court. (*People v. Nguyen* (2007) 152 Cal.App.4th 1205, rev. granted October 10, 2007, S154847; see also *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1191-1195 [juvenile adjudications from proceedings that do not afford jury trial right do not fall within prior conviction exception; thus prior juvenile adjudications must be pleaded and proven to the jury beyond a reasonable doubt to support sentence enhancement].)⁴

³ The alternative conclusion that juvenile adjudications properly fall within the prior conviction exception is significant because under California's sentencing scheme defendants are afforded only a *limited* right to a jury trial on the issue of prior convictions, and the trial court's authority to resolve factual issues concerning prior conviction allegations without violating *Apprendi* is derived from the prior conviction exception. (See fn. 2, *ante*; *People v. McGee*, *supra*, 38 Cal.4th at pp. 685-686, 708-709; *People v. Jefferson*, *supra*, 154 Cal.App.4th at pp. 1386-1388; see also *People v. Smith*, *supra*, 110 Cal.App.4th at p. 1079, fn. 9.)

⁴ A different panel of our court has concluded the use of a juvenile adjudication as a strike prior conviction violates the defendant's *Apprendi* rights. (*People v. Baltazar*, D050137, unpublished opinion filed May 5, 2008, rev. granted July 16, 2008, S164248.)

The California Supreme Court has also granted review in two cases holding that juvenile adjudications may be used to impose upper term sentences. (*People v. Grayson* (2007) 155 Cal.App.4th 1059, rev. granted Dec. 19, 2007, S157952; *People v. Tu* (2007) 154 Cal.App.4th 735, rev. granted Dec. 12, 2007, S156995.)

Pending resolution of this issue by our high court, we follow the above-cited decisions holding that use of prior juvenile adjudications for penalty augmentation under the three strikes law is constitutionally permissible.

Our holding permitting the use of Foster's prior juvenile adjudication as a strike is without prejudice to his right to file a petition for writ of habeas corpus raising this issue in the event there is a California Supreme Court decision favorable to his position.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.